Nos. 12,349, 12,352, 12,350

In the United States Court of Appeals

For the Ninth Circuit

TIMOTHY E. ARMSTRONG, et al., *Appellants,* vs. MATSON NAVIGATION COMPANY, a corporation, *Appellee and Cross-Appellant,* UNITED STATES OF AMERICA, *Appellee and Cross-Appellee.*	No. 12,349	CONSOLIDATED CASES
JAMES KEITH CURRIE, et al., *Appellant,* vs. MATSON NAVIGATION COMPANY, a corporation, *Appellee and Cross-Appellant,* UNITED STATES OF AMERICA, *Appellee and Cross-Appellee.*	No. 12,352	
DONALD G. STEWART, et al., *Appellants,* vs. MATSON NAVIGATION COMPANY, a corporation, *Appellee and Cross-Appellant,* UNITED STATES OF AMERICA, *Appellee and Cross-Appellee.*	No. 12,350	

Brief for Appellee and Cross-Appellee United States of America

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FOREWORD

Appellee and cross-appellee, United States of America,* accepts the statement of appellants' foreword except in

*At the time in question the *S.S. Malama,* owned and operated by Matson Navigation Company, was under time charter to the

its reference to *The President Harrison* (C.C.A. 9th) 177 F.2d 107, 111. Appellants state the present cases parallel *The President Harrison,* thus suggesting this Court's decisions in such case are decisive of this litigation. For reasons hereinafter stated in this brief, appellee emphatically contends that *The President Harrison* is not dispositive of the present suits.

STATEMENT OF JURISDICTION

Appellee does not oppose the statement of jurisdiction contained in the individual briefs of appellants.

United States of America. When the instant libels were filed, Matson impleaded the United States of America claiming that by the terms of the charter the latter agreed to indemnify Matson if Matson were liable for the claims of libelants for war bonus and maintenance during internment. In its answers to the impleading petitions (A. 27, 53-54), the United States of America admitted such responsibility to Matson if the latter were held liable for the war bonus claims but denied such responsibility to Matson respecting any liability the latter might have for the maintenance claims. Accordingly, in the District Court the United States of America undertook the defense of the claims for war bonus during internment while Matson presented its own defense respecting the claims for maintenance during internment. When the District Court found that neither Matson nor the United States of America were liable either for war bonus or maintenance during internment it dismissed the petitions impleading the United States of America. Matson has filed a cross-appeal to preserve its claims under the impleading petitions (A. 117, 126). In the event this Court reaches a different result than the District Court regarding liability of Matson for war bonus or maintenance during internment, the issues raised by the impleading petitions and the answers thereto of the United States of America must be remanded to the District Court for determination. The United States of America continues its defense against the claims for war bonus during internment, and this brief in its behalf is directed solely to such subject. To avoid confusion as to the status of the parties the appellee and cross-appellant Matson Navigation Company will be referred to herein simply as "Matson" and the United States of America as "appellee."

STATEMENT OF THE CASE

The basic facts are undisputed.* Appellants were licensed and unlicensed crew members of the *S.S. Malama,* which was under time charter from Matson to appellee when she sailed from San Francisco (A. 7-8, 9, 10, 28, 53). Appellants were all members of various maritime unions (including the National Organization of Masters, Mates and Pilots of America; Marine Engineers' Beneficial Association; American Communications Association, Marine Division; Sailors' Union of the Pacific; Pacific Coast Marine Fireman, Oilers, Watertenders and Wipers Association; Marine Cooks and Stewards Association of the Pacific Coast), which had negotiated various collective agreements governing basic wages, emergency wages, and war bonus with the Pacific American Shipowners Association, an employer organization representing Matson (A. 10, 19, 20, 89-92).

The *Malama* sailed on November 25, 1941, for a voyage to "Ports in the Philippine Islands by a route, including stops, as ordered by an agency or department of the United States government * * *" (A. 9, 87-88, Ex. No. 2). It arrived at Honolulu, December 8, 1941—the day after the Japanese bombed Pearl Harbor and invaded the Philippines (A. 16).† Several days later the *Malama* sailed from Honolulu on a route ordered by military and naval authorities of the United States (A. 16,† 88). On January 1, 1942 while

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*Unless otherwise stated, all record references are to Apostles on Appeal in *Armstrong, et al. v. Matson Navigation Co.,* No. 12,349.

†Reference is to Apostles on Appeal in *Sterling, et al. v. Matson Navigation Co.,* No. 12,351. For reasons not known to counsel of the Appellee, the Reporters Transcript is contained in the Apostles in this case. The files of the clerk contain a stipulation that the determination of the issues of this case will abide the determination of the Court in the cases before it.

heading in the direction of New Zealand, the *Malama* was attacked and subsequently sunk by Japanese forces (A. 13). The crew were taken aboard the Japanese raider and held captive (A. 13). January 6, 1942, they crossed the 180th meridian, Westbound, en route to Japan where they were interned until about September 5, 1945 (A. 13-14). They were subsequently repatriated to Pacific Coast ports, recrossing the 180th meridian Eastbound on various dates (A. 14-15).

According to its obligation contained in riders attached to the shipping articles and certain of the aforementioned collective agreements referred to in the riders, Matson paid appellants all basic wages and emergency wages due and owing them for the period during which they were held captive and until arrival at Continental United States ports (A. 4, 15, Ex. No. H). Matson also paid all war bonus due appellants for the time while they were on the Japanese raider West of the 180th meridian, and after liberation, while they were on aircraft or vessels West of the same meridian during repatriation (A. 8, 16, 24, 94-95, Ex. No. I).* Additional claims were made by appellants for war bonus and maintenance during the time they were interned by the Japanese on land. Matson refused to pay these claims and the same are the subject of this litigation.

Concededly, appellants' rights to war bonus are contractual ones dependent upon the contract of hire opera-

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*In each brief submitted for appellants there is a misleading statement of what amount of war bonus was paid appellants. It is stated that they were paid no war bonus while West of the 180th meridian. This is only true insofar as it applies to the time while they were interned on land. Otherwise, as stated above, they were paid a war bonus while aboard vessels West of the 180th meridian.

tive at the time they "signed on" the *Malama* (A. 2-3). The pertinent portions of this contract are contained in riders attached to the shipping articles and in collective supplementary bonus agreements (A. 92). The provisions of the rider dealing with the payment of benefits to licensed personnel, including the radio officer, while aboard the *Malama* and with the eventuality of internment or destruction of that vessel, read as follows:

"The Matson Navigation Company agrees to pay war risk bonuses to the crew of the SS Malama from the crossing of the 180th Meridian Westbound until recrossing the same Meridian Eastbound as follows:

Licensed Deck Officers:	66⅔% of the basic monthly wages effective as of Oct. 1, 1941;
Licensed Engine Officers:	66⅔% of the basic monthly wages effective as of Oct. 1, 1941;
Radio Officer:	66⅔% of the basic monthly wage effective as of Oct. 1, 1941.

"In the event the vessel is ordered by an Agency or Department of the United States Government to return via another trade route, war risk bonuses will be paid while the vessel is in any of the war zone Areas I to VI inclusive at the rates described in the supplementary agreements between the various Marine Unions and the Pacific American Shipowners Association at San Francisco.

* * * * * * *

"*In the event the vessel be interned, destroyed or abandoned* as a result of war operations and be un-

able to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreements between the parties shall be paid to the date members of the crew arrive in Continental United States ports and the employes shall be repatriated to a Continental United States port. *While the employes are in the war zone areas described in the supplementary agreements covering war risk bonuses payable to Licensed Officers, war risk bonuses shall aso be paid to them at the rate of 66⅔% of the said basic wages in Areas I to V inclusive,* and *25% in Area VI.*" (Italics added.) (Ex. No. 2.)

The rider governing the unlicensed personnel is substantially the same, and its material provisions read as follows:

"The Matson Navigation Company agrees to pay war risk bonuses to the crew of the SS Malama from the crossing of the 180th Meridian Westbound until recrossing the same Meridian Eastbound, as follows:

Unlicensed Deck Personnel:	$80.00 per month;
Unlicensed Engine Personnel:	$80.00 per month;
Steward's Personnel:	$80.00 per month to all employes entitled to receive $120.00 or less as basic monthly wages as of Oct. 1, 1941; 66⅔% of the basic monthly wages as of Oct. 1, 1941 to all employes entitled to receive basic monthly wages in excess of $120.00.

"In the event the vessel is ordered by an Agency or Department of the United States Government to return via another trade route, war risk bonuses will be paid while the vessel is in any of the war zone Areas I to VI inclusive at the rates described in the supplementary agreements between the various Marine Unions and the Pacific American Shipowners Association at San Francisco.

* * * * * * *

"*In the event the vessel be interned, destroyed or abandoned* as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreements between the parties shall be paid to the date the members of the crew arrive in a Continental United States Port, and the employes shall be repatriated to a Continental United States Port. *War risk bonuses at the rates specified in sub-division (b) paragraph 1 of the supplementary agreements between the parties shall be paid while employes are in the war zone areas defined therein.*" (Italics added.) (Ex. No. 2.)

At this point it is advisable to call special attention to certain features of the two riders quoted above. Before doing so it should be made clear that the primary object of both the riders and the supplementary bonus agreements, which will be discussed hereinafter, was to prescribe extra compensation to crew members in the form of war bonus on account of war hazards to which they might be exposed by virtue of the vessel on which they were employed making a voyage into certain danger zones. This primary object may be stated more simply as a pro-

vision for sailing bonuses to crew members on voyages made hazardous by war conditions. The matter of internment or destruction of the vessel aboard which the crew members were employed at this time, before the United States was engaged in the war, was a remote possibility and provision for such an eventuality was only an incident to the main purpose of prescribing sailing bonuses which was foremost in the minds of the parties.

An examination of the riders will disclose the following features: First, provision was made for the amount of bonus to be paid to the crew members in respect to the known voyage on which the vessel was about to sail. As is pointed out elsewhere in this brief, the articles called for a trans-Pacific voyage to the Philippine Islands with certain other routing liberties. Inasmuch as only a portion of such a voyage was considered hazardous by virtue of war conditions, it was specified that war bonus became payable on the voyage only when the vessel crossed the 180th meridian Westbound and discontinued when the vessel recrossed the same meridian Eastbound. This feature of the riders dealt with the sailing bonus for the anticipated trans-Pacific voyage and was geared to the wages received by the various crew members according to their ratings. The meridian limitations and rates prescribed coincided with and reasserted those set forth in the supplementary agreements for this particular war zone or voyage.

The second feature of the riders that should be particularly noted is the provision for the payment of war bonus if the vessel were diverted from her original voyage and were ordered to a different route. Since what rerout-

ing of the vessels might be ordered by the United States Government could not be anticipated at the time the articles were opened, it was provided that while the vessel was in a war zone or on a voyage defined in the supplementary agreements war bonus should be paid at the rates specified in such agreements. These agreements, of course, defined all the war zones or voyages in respect to which bonuses might be payable. By virtue of the second paragraph of each rider the applicable war bonus prescribed in the supplementary agreements for any particular war zone or voyage became automatically operative when the vessel entered upon such war zone voyage.

The third feature of the riders is the one with which we are most directly concerned in this litigation. This deals with the provision contained in each rider in the event of internment, destruction or abandonment of the vessel as the result of war operations. Upon the happening of such an event it was provided that basic wages and emergency wages as specified in the basic collective bargaining agreements between the parties should be paid to the date the crew members arrived in a Continental United States Port. Furthermore, the requirement was imposed on Matson, as the employer of the crew members, to repatriate them to a Continental United States Port. In addition, and most significantly to the issues involved in this litigation, provision was made for the payment of war bonus to the crew members while aboard such a repatriating vessel. Again, because it was impossible to determine what war zone voyages the repatriating vessel or vessels would enter upon in returning the crew members to a Continental United States Port, it was necessary to make ex-

press reference to the supplementary agreements, in the same manner and for the same purposes that such reference was made in the case of the vessel being rerouted by the United States Government. Accordingly, it was specified that war bonus would be payable to the crew members while in the war zone areas or on war zone voyages as defined in the supplementary agreements.

It should be particularly noted in connection with the consideration of the two riders, that in the event of the internment, destruction or abandonment of the vessel, as occurred in the present case, reference to the supplementary bonus agreements was *expressly and specifically* made in order to determine when war bonus would be payable.* The unlicensed personnel rider also required reference to these agreements in order to determine the rate of bonus which depended upon the amount of the basic monthly wage and which varied according to the war zone voyages on which the vessel was engaged. The licensed personnel rider incorporated the applicable percentage rates contained in the supplementary agreements governing such crew members because their rates were not dependent upon a minimum basic monthly wage.

The pertinent portions of these supplementary agreements, to which express reference was made in the riders, are substantially the same. For the sake of brevity here, a typical licensed personnel agreement is set forth in the Appendix and the material provisions of only one of the

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*Appellants have studiously avoided reference to this provision of the riders in their argument and have thus completely misconceived the issues of this litigation.

unlicensed personnel agreements (Ex. No. 6)* is now quoted:

"I. The following war bonus rules shall govern the parties hereto—

"a) There shall be five war risk zones; namely:

* * * * * * *

"III. Trans-Pacific *voyages* to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound.) (Italics added.)

* * * * * * *

"4. War Risk Insurance in the sum of $5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement.

"*In the event a vessel is interned, destroyed or abandoned* as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. *War bonuses* at the rates specified in subdivision (b) of paragraph 1 hereof *shall be paid while employees are in the war zones defined herein.* (Italics added.)

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*The supplementary bonus agreement quoted is that governing crew members in the unlicensed deck department represented by the Sailors' Union of the Pacific. Similar agreements governing the unlicensed engine room department represented by the Pacific Coast Marine Fireman, Oilers, Wipers and Watertenders Association (Ex. No. 7) and cooks and stewards represented by the Pacific Coast Marine Cooks and Stewards Union (Ex. No. 8) contain identical provisions to those quoted above.

"6. The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941 or upon any voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles."

The District Court construed the riders attached to the articles, as it was required to, with the applicable supplementary agreements, and held that the contract of hire did not contemplate the payment of war bonus during internment on land (A. 92-94, Findings of Fact XI, XIV). The maintenance claims were also denied.*

THE ISSUES

The principal issue is whether the riders attached to the *Malama* shipping articles, construed with the applicable supplementary agreements, provided for the payment of a war bonus during internment on land by the enemy. Subsidiary issues, and largely irrelevant, arise from the trial court's exclusion of evidence advanced by appellants to alter the plain language of the contract of hire, and to establish a deviation. Finally, appellants still press claims for maintenance allowances during the internment period.

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*Contrary to the assignments of errors and the allegations in the brief in No. 12,350, the District Court did not allow costs to Matson or Appellee. An earlier allowance of costs was struck from the final decree of the District Court (A. 101).

ARGUMENT

I. The Shipping Articles, the Riders Attached Thereto, and the Supplementary Agreements Referred to Therein Were Plain, Certain, and Unambiguous and Clearly Did Not Entitle Appellants to War Bonus During Internment on Land.

Because of appellants' contention that *The President Harrison* is dispositive of this case, which appellee emphatically denies, frequent reference to that case is necessary. Therefore, at the outset counsel for appellee wish to assert, so as to avoid subsequent confusion, that there is no intent on their part to reargue *The President Harrison.* Reference to it is made only to demonstrate its non-applicability to this litigation. It is not necessary here, as it was in *The President Harrison* case, to consider the relationship between operative collective bargaining agreements and individual contracts of hire in the form of shipping articles and attached riders. In *The President Harrison* case consideration of the collective agreements along with the shipping articles and attached riders was urged because the same were operative by their own express terms in respect to the parties and the subject matter in dispute, because they circumscribed the rights of the parties to vary collective terms of employment by individual contracts of hire, because they and the shipping articles and attached riders together prescribed the terms of employment and were construable together under controlling rules of construction, and because the riders were ambiguous and the collective agreements furnished the required clarification.

For reasons which presently will be stated, consideration of the supplementary bonus agreements in the pres-

ent case is in no respect dependent upon acceptance of the foregoing propositions. For the purposes of the present case appellee will adopt the contention of the appellants here and the views expressed by this Court in *The President Harrison* case that the shipping articles are the controlling contract of employment. Appellee points out in this connection, however, that the riders attached to the shipping articles, by express terms of reference, *require* consideration of the supplementary bonus agreements. Appellants, in their briefs, studiously refuse to acknowledge this evident and significant fact.

Appellee agrees with appellants that the entire contract of hire was clear and unambiguous.* Nevertheless, disagreement exists over the contents and construction of this contract. Appellee submits that the only rational interpretation of the contract of employment bars the claim to a war bonus during internment on land. The District Court so held after the fullest consideration, and its findings are entitled to great weight.

See, *e. g.*,

Rideout v. Charles Nelson Co. (C.C.A. 9th) 55 F.2d 783, 786;

The Heranger (C.C.A. 9th) 101 F.2d 953, 957.

Appellee agrees with the appellants that the portions of the shipping articles relevant to this litigation are con-

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*Contrary to the assignment of errors of appellants, the District Court did not find that the riders attached to the shipping articles were ambiguous. Findings of fact of the District Court resting on the contract of hire standing alone, adequately support its decision. (Findings of Fact XI, XIV.) Also contrary to a suggestion contained in appellants' brief submitted in No. 12,350, counsel for appellee did not assert that the riders attached to the shipping articles were ambiguous. Counsel for appellee expressly denied that they were ambiguous. (A, No. 12,351, p. 33.)

tained in riders attached to the shipping articles. The pertinent portions of both riders have already been quoted in the statement of facts. It could not be clearer that both of them require reference to the collective supplementary bonus agreements for determining *when* the war risk bonus is to be paid in the event the vessel is interned, destroyed, etc. The licensed personnel rider states that the war risk bonuses are to be paid "while the employees are in the war zone areas described in the supplementary agreements * * *." That governing unlicensed personnel states that the war bonus is to be paid "at the rates specified in subdivision (b), paragraph 1 of the supplementary agreements between the parties * * * while employees are in the war zone areas defined therein." Thus, these supplementary agreements, which had been negotiated by union representatives representing the appellants and the P.A.S.A., representing Matson, are expressly made an integral part of the contract of employment by the riders attached to the shipping articles. By express requirement of the riders, one must look to these agreements for the description of the war zone area, which delineates when bonus should be paid. Failure of appellants to take cognizance of this requirement of the riders and to consider these agreements results in a complete misconception of the contract of hire which governs their rights. As a result they blindly place reliance on this Court's decisions in *The President Harrison.*

The President Harrison, however, is not dispositive of this litigation. Appellants assert that the articles in *The President Harrison* and those herein involved are substantially the same. Close examination of the riders at-

tached to the two shipping articles reveals a material difference. In *The President Harrison* the riders did not expressly, as in this case, refer to the supplementary bonus agreements. In *The President Harrison* counsel for appellee contended, and the District Court found, that a proper interpretation of the shipping articles required consideration of the supplementary bonus agreements, because, among other things, the riders attached to the articles were uncertain and merely inartful attempts to paraphrase the supplementary agreements.* However, this Court did not agree with this conclusion in *The President Harrison.* It expressly held that the rider standing alone contained a definition of the war zone area; two paragraphs of the *rider* were construed together to establish this. See 177 F.2d at 109. Thus, the theory adopted by this Court in *The President Harrison* obviated reference to the supplementary agreements. However, the express language of the riders attached to the *Malama* articles *does* require reference to the supplementary bonus agreements. Therefore, contrary to appellants' contentions, the construction of *The President Harrison* shipping articles is not authority for those involved in the present case.

Thus, we reach the major issue of this litigation, to wit, to what extent is a right to war bonus during internment on land created by the supplementary agreements to

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*Counsel for appellee never stated that the issues in *The President Harrison* and in this case were the same, as counsel for appellants in the brief submitted in No. 12,350 would suggest. Instead, counsel for appellee stated that he could point out the significant differences between the riders involved in each case in "ten minutes," which would have been an indication of the distinction made above. (A. No. 12,351, 97-102.) A fair reading of the colloquy clearly shows that counsel did not concede that *The President Harrison* was dispositive of this case.

which the riders attached to the *Malama* articles refer. Six supplementary agreements, of which the pertinent portions are substantially alike, govern appellants' rights and Matson's obligations. The interpretation of these collective agreements is certainly now squarely and directly placed before this Court, perhaps, for the first time.

Counsel for appellee must concede that until this Court filed its amended decisions in *The President Harrison* case on September 9, 1949, they considered that this Court's interpretation of these same agreements in *Steeves v. American Mail Lines, Ltd.* (C.C.A. 9th) 154 F.2d 24, 25, was necessary and vital to the ultimate determination and was not *dictum.* This belief was also held by the District Court in the present case and in *The President Harrison.* Furthermore, counsel for the appellants in this case, who were also counsel for the appellants in *The President Harrison,* never once asserted a contrary view. In reference to two of these identical collective agreements governing unlicensed personnel this Court stated in the *Steeves* case:

> "Since, if rational, we must construe the second paragraph [of the rider] to give effect to its agreements, we construe the provision of the union agreement for period of bonus during the return voyage of the ship to the 180th meridian as not 'applicable' to the specific agreement to pay one during the period of captivity after the ship's destruction in Manila.
>
> "The same is true of the cooks and stewards union agreement. There, the war bonus period is during the ship's voyage westerly from and easterly to the 180th meridian. It is not applicable to a case of the destruction of the vessel and the subsequent period

of captivity and repatriation specifically provided for in the second paragraph of the rider.

"It was thought that there was some ambiguity in the provisions of these instruments which warranted testimony as to their meaning. We do not agree. It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles." 154 F.2d at 25.

Since this interpretation of these collective agreements has been characterized by this Court in *The President Harrison* as *dictum,* then it is equally certain by the same standards that any interpretations of these same agreements rendered by this Court in the latter case are no more conclusive for the following reasons:

First: The disposition of the bonus claims of the licensed personnel indicates that the shipping articles standing alone were considered the measure of appellants' rights. The rate for computing the war bonus contained in the supplementary agreements was higher than that in the rider, but the Court held that the lower rate of the rider was controlling. See *Griffin v. American President Lines, Ltd.* (C.C.A. 9th) 177 F.2d 111, 113. This clearly establishes that consideration of the supplementary agreements was not necessary to the holding of the case, since when a variance as to a vital term existed between them and the articles, the latter controlled. Therefore, any statements concerning the agreements are merely *dictum,* on the authority of the Court's disposition in *The President Harrison* of its former language in the *Steeves* Case.

Second: The Court's discussion of the supplementary agreements appears to be support merely for its interpretation of the shipping articles. There was no independent consideration of the agreements standing alone, which is indicated by the Court's statement that the agreements were "construed in connection with * * * the rider." See 177 F.2d at 109. Those riders, however, were in no way relevant to or supportive of the meaning of the agreements. Counsel admit that they argued in *The President Harrison* that the supplementary agreements were relevant to and supportive of the meaning of the riders. This was so because, according to counsel's contention, the riders were drawn to conform with the agreements. Counsel emphatically contend, however, that the rider was not relevant to or supportive of the meaning of the supplementary agreements. The reason is clear. The agreements were drafted to cover all shipping operations of all member companies of the P.A.S.A. *The President Harrison* articles and riders, at most, could only govern the rights of its crew members; its articles and riders in no way could qualify rights under the collective bonus agreements of seamen sailing aboard other vessels under different articles and for other employers. A construction of the supplementary agreements made dependent upon *The President Harrison* articles and riders would create such a qualification. Therefore, to suppose that *The President Harrison* contains an interpretation of these supplementary agreements standing alone would be to create a novel rule of construction indeed.

For the reasons stated above, we repeat our earlier assertion that the interpretation of these supplementary bonus agreements is now squarely and directly presented to this Court for initial determination. Even to this day counsel for the appellants have not contended that these agreements, specifically referred to in the *Malama* riders, create a right to war bonus during internment on land. We challenge them now to recognize the existence of these collective bargaining agreements, to which express reference is made in the riders, and to join issue on this single, major point of whether these agreements define war zones in such terms as to provide for war bonus while interned on land.

We unhesitatingly and confidently direct attention to our analysis of the pertinent portions of the supplementary agreements. The riders require that we examine the description of the war zone areas in the agreements, since a war bonus is to be paid "while the employees are in the war zone areas described" therein. The language in the three supplementary agreements governing unlicensed personnel is identical and reads as follows:*

"a) There shall be five war risk zones; namely:

* * * * * * *

"III Trans-Pacific *voyages* to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian Westbound, until recrossing the same Meridian Eastbound.)" (Italics added.)

Construing the pertinent portions of the riders attached to the articles with those of the supplementary agree-

*The corresponding provisions in the licensed personnel agreements are set forth in the Appendix.

ments, as we are required to, we have the following provision:

> "In the event *the vessel be interned, destroyed or abandoned as the result of war operations* and is unable to continue her voyage, *basic wages* and *emergency wages* specified in the collective bargaining agreements between the parties *shall be paid to the date members of the crew* arrive in Continental United States ports, and the employees shall *be repatriated* to a Continental United States port. *War risk bonuses* * * * shall be paid while employees are in the war zone areas defined * * *" as "Trans-Pacific *voyages* to (the) * * * Philippine Islands * * *. (After crossing the 180th Meridian Westbound, until recrossing the 180th Meridian Eastbound.)" (Italics added.)

It could not be clearer that the war bonus is compensation for the risks incurred by employment on a vessel voyaging in specified areas. By no rational interpretation of the word "voyage," which is the term chosen to delineate the war zone area, can internment on land be comprehended within its meaning.

This intent to make the right to war bonus dependent on the risks incurred from employment on a vessel is even more evident in other provisions of the supplementary bonus agreements to which the riders expressly refer. We have previously been considering the rights of crew members in the event of internment or destruction of the vessel. These provisions of the bonus agreements, however, were merely incidental to the major purpose of these agreements. At the time these agreements were negotiated, several months before the startling and sur-

prising attack by the Japanese on Pearl Harbor, the possibility of internment or destruction of an American vessel was remote and the possibility of internment of the crew so improbable as not even to warrant mention or specific provision for such an event. On the other hand the increased physical hazards to crew members aboard vessels operating in war zones formed the basis for added compensation or bonus to them for exposure to such risks. Consequently, the major subjects for negotiation were a determination of the areas or voyages in respect to which these added war hazards existed and of the amount of the increased compensation or bonus warranted for sailing on such voyages.

Therefore, the supplementary agreements with the S.U.P., M.F.O.W.W., and M.C.& S. (Ex. Nos. 6, 7, 8) at the outset, quite naturally, relate the payment of war bonuses to the period when crew members are aboard vessels in war zones. The preamble clause which defines the purposes of the contracts, in the M.F.O.W.W. agreement reads as follows:

> "Whereas, the parties hereto are engaged in the negotiation of a collective bargaining contract relative to wages, hours, and working conditions for members of the Union and desire to provide a collateral or supplementary agreement for bonuses payable to members of the Union *on vessels going into war zones;*"* (Italics added.)

Language could not more clearly provide that war bonuses were payable only while the seamen were on vessels. The

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*The preambles of the S.U.P. and M.C.&S. agreements differ in language, but contain substantially the same content in this respect.

subsequent definition of the "war zone" as a "voyage" and the provision allowing a war bonus only while in the war zone are the logical development of this primary purpose.

When it is properly understood that the major purpose of these agreements was to provide for bonus while the crew were aboard vessels on voyages in war zones and that providing for the consequences of internment of the vessel was incidental, all the provisions of the riders, which incorporate these agreements, are consistent and meaningful. For example, the opening clause of the riders provides that a war bonus was due the crew from the crossing of the 180th meridian Westbound until recrossing the same meridian Eastbound. No reference to the bonus agreements is made. The reason is clear. At the time of signing on, it was known that the voyage was a trans-Pacific one. The opening clause is a paraphrase of the definition of the war zone as "Trans-Pacific voyages" (limited to that portion West of the 180th meridian) contained in the bonus agreements, so that reference to the agreements was unnecessary. However, in the event of interruption of the contemplated voyage, either by governmental alteration of the voyage or by internment or destruction of the vessel, a paraphrase of bonus rights contained in the agreements was not possible since it was unknown what war zone voyage might then be undertaken. Consequently, express reference in both instances incorporated the bonus agreements, which by their language make clear that a war bonus was payable only while on board a vessel engaged on a voyage in one of the specified areas.

Any other interpretation would render the supple-

mentary agreements meaningless. This may be demonstrated by a consideration of what the bonus rights of appellants would have been had they signed on for a voyage to a different war zone. All of the war zone areas are defined as "voyages." For example, War Risk Zone II is defined in the following manner:

> "Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)"

It should be noted that war bonus on such a voyage is payable during the entire voyage and not after the vessel crosses a particular meridian, as in the case of trans-Pacific voyages. If the vessel were destroyed on such a trans-Atlantic voyage and the crew were interned in Germany surely this place of internment would not be deemed included in the war zone definition of "Trans-Atlantic voyages to Russia." This inescapable conclusion demonstrates that the definitions of war zones in terms of voyages precludes application of war bonus to a period of time or to a geographical area of land. A war zone defined as a trans-Pacific voyage but limited to the dangerous portion lying West of the 180th meridian is no less a definition in terms of a voyage than a war zone defined as a trans-Atlantic voyage (whole voyage). Hence, crew members interned on land are not in a war zone, as defined in the supplementary agreements, no matter where that land is geographically located.

Since these war zone areas are defined in the bonus agreements as "voyages," there is no rational basis for treating the same word used in an agreement as having a different meaning when used similarly in the same

agreement. To do so would violate an elementary rule of construction, *i.e.,* a written document should be interpreted as a whole so as to make all parts consistent. See *Cal. Civ. Code,* §§ 1641, 1642; *Cities Service Gas Co. v. Kelly-Dempsey & Co.* (C.C.A. 10th) 111 F.2d 247, 249.

The provisions in the supplementary agreements for port bonuses in certain cases further documents the intent to relate war bonuses to the position of the vessel. For instance, in addition to the port bonus of $100 paid for calling at Suez, or any other port subject to regular bombings, an extra $5.00 is provided "for each day beyond five days that the *vessel* is in that port." (Ex. Nos. 6, 7, 8). Thus, port bonuses are geared to vessels in the same manner that bonuses on voyages depend upon a vessel engaging in such a voyage. Finally, in the M.M. & P., M.E.B.A., and A.C.A. supplementary bonus agreements machinery provided for the adjustment of war bonus rates, dependent on future events, which was geared to "war risk insurance rates paid on hulls of American flag *vessels* operating in all areas above described." Clearly, if war bonuses were dependent upon war risks in all areas, including land, war risk insurance rates on vessels would be an inappropriate measure of such risks, since these rates are determined only by the navigational war risks to which vessels are subjected. The adoption of this standard for future modification of war bonus rates is additional clear indication that war bonuses were payable only in relation to a vessel operating on a voyage described as a war risk area.

In concluding argument of this point, appellee submits that the language of the supplementary agreements, made

an integral part of the riders by reference, clearly establishes that a war bonus was due only while the men were in a war zone area which is defined as being when a *vessel is on a voyage in specified areas.* Although Admiralty Courts traditionally have been solicitous of the welfare of seamen, appellee contends that this case would be an improper one for indulging in any presumption that grants appellants benefits not intended by the governing contract. Appellee emphatically asserts that there is no ambiguity in the contract of hire, and that its clear meaning precludes payment of war bonus during internment on land. Should the Court disagree with appellee and conclude for reasons not apparent to appellee that the contract is ambiguous, the Court should not adopt presumptions which would distort the meaning of the contract made manifest by application of paramount rules of construction. It should also be borne in mind, if there is any ambiguity to be found in this contract of hire, that such ambiguity is in a collective bargaining agreement. This is not the type of agreement that seamen enter into as individuals with supposedly unequal powers of understanding. Nor is it an agreement that the employer alone drafted so as to have doubts, not otherwise removable, resolved against him. As Judge Goodman ably pointed out in his opinion in *The President Harrison,* 73 F. Supp. 944, 948, the seamen represented by the maritime unions negotiating these contracts can no longer be considered defenseless and incapable of looking after their own interests. Their rights are vigilantly and militantly protected by such unions, as counsel for appellants must concede.

Finally, the Court should not indulge any presumption so as to write an entirely new contract which would place appellants in a more advantageous position than that held by many thousand persons similarly situated. The scheme of compensation contained in these supplementary agreements and the riders attached to the shipping articles, as contended for by appellee, is identical to that adopted by the entire shipping industry.

See:

Maritime War Emergency Board, Decision No. 5, Rev.* (Ex. K).

See also:

Mason v. Texas Co. (C.C.A. 1st) 171 F.2d 559, 562, *cert. den.,* 93 L.Ed. 1035;

Montoya v. Tidewater-Associated Oil Co. (C.C.A. 2d) 174 F.2d 607, 610, *cert. den.,* 94 L.Ed. 58.

It is as generous a compensation scheme as that adopted by Congress to compensate United States employees taken captive by the enemy (see *56 Stat. 143,* 50 U.S.C. App. §§ 1001-1018), or the employees of contractors with the

*Counsel for appellee does not press the contention herein, as they did in *The President Harrison,* that the decisions of the Maritime War Emergency Board govern the seamen's rights to war bonuses. Failure to make that contention is not to be considered a concession by appellee that those decisions do not so control. Appellee is merely respecting this Court's prior determination of this issue. However, in view of the fact that a petition for certiorari is to be filed in the Supreme Court of the United States in *The President Harrison* cases, this issue may be considered by that Court and become critical to the ultimate disposition of that case. Should the Supreme Court of the United States disagree with this Court's previous conclusion on this issue, appellee reserves the right to argue that appellants' rights herein should be governed by the decisions of the Maritime War Emergency Board.

United States taken captive by the enemy (see *56 Stat. 1028,* 42 U.S.C. §§ 1701-1717). These references indicate that Matson and appellee have not attempted to discriminate against appellants, but, on the contrary, that P.A.S.A. and Matson actually anticipated the entire shipping industry and Congress in providing a full measure of compensation for employees subjected to war risks. Having granted and respected these rights, Matson is now entitled to have honored its rights under the contract.

II. The District Court Did Not Err in Excluding Evidence Purporting to Establish That the Parties Gave a Contrary Meaning to the Contract of Hire by Their Actions.

Appellants contend that the District Court erred in failing to admit certain evidence, and refusing to reopen after submission for admission of other evidence, which purportedly establishes an interpretation given the contract of employment by conduct of the parties. Appellee submits that this evidence was properly excluded by the trial court. Concededly, appellants by their pleadings pegged their rights on the written contract contained in the shipping articles of the *Malama,* which expressly require consideration of the supplementary agreements. Appellants contend, and appellee agrees, that the contract of hire is clear and unambiguous. This should clearly prevent the alteration of a written contract by vague testimony elicited from interested parties six years after the occurrence of the event in question, to wit, the signing of the shipping articles.* All of the policy reasons supporting

*Counsel for appellee do not intend to retreat from the contentions they made in *The President Harrison* by this statement. In that case they contended that the contract of hire included

the precept of the Parol Evidence Rule could not be more clearly present. It has frequently been held that the contract of hire as evidenced by the shipping articles cannot be changed by parol evidence, short of showing fraud.

See:

The Lakme (Wash. N.D.) 93 Fed. 230, 231;
The Ucayali (E.D. N.Y.) 164 Fed. 897, 899;
Foreman v. J. M. Benas & Co. (S.D. N.Y.) 247 Fed. 133, 134 (A. Hand, J.).

However, assuming the admissability of this evidence, which has been included in the record, appellants' construction of the contract is not supported by it. Appellants contend that the deputy shipping commissioner who was present at the signing of the shipping articles, in response to inquiries of crew members, stated that a war bonus would be paid until repatriation to a United States port, if the crew were captured and interned. It is stated that this was the understanding of the master of the vessel, who consequently remained silent when this information was given. The affidavit of the master is relied upon to establish this. The allegations in the affidavit do not support this contention. It is therein recited that the question asked the deputy shipping commissioner was, "what would happen if the *vessel* was captured or interned?"

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agreements apart from the shipping articles. This contention rested on the nature of the shipping articles and the collective bargaining agreements. It is unnecessary in this case to establish the applicability of these materials since the articles expressly incorporate them. Discussion is unnecessary to show the difference between agreements expressly incorporated and testimony of the understanding held by the seamen at the time the agreements were signed.

(A. 71). The question was directed to the consequences of internment of the vessel, and not to that of the men. At this time, November 25-28, 1941, the United States was not yet at war. The suddenness of the attack on Pearl Harbor with its consequent surprise to the American public is adequate evidence, of which the Court may take judicial notice, that our entry into the Pacific war was not considered imminent. Consequently, there is no basis to assume that the parties did not expect that in the event of capture of an American vessel the crew members would be repatriated by customary international channels. Internment of the crew was not anticipated, nor should it have been. Thus, the commissioner's reply that "wages and bonus would go on until they got back to the United States" (A. 72) was an accurate interpretation of the riders insofar as they provided for war bonus during repatriation. At best the commissioner's statements are ambiguous and do not possess that quality of proof necessary to overcome the strong presumption in favor of the written contract. See *North. Mut. Life Ins. Co. v. Nelson,* 13 Otto 544, 103 S.Ct. 436, 438.

The Court of Appeals for the Second Circuit has recently rendered a decision fully supporting appellee's contentions.

Montoya v. Tidewater-Associated Oil Co., supra.

In that case libelant, a seaman, testified that he had a limited ability to read English, and that he was not shown the page of the shipping articles containing provisions for war bonus in conformance with decisions of the Maritime War Emergency Board. He further testified that the

shipping commissioner, in response to a question concerning the right to war bonus, stated that it continued until the seaman returned to New York. Nevertheless, the Court of Appeals held that libelant's right to war bonus was governed by the written provisions of the articles and not by the libelant's understanding of his rights derived from the commissioner's remarks. Two cases could not be more identical. Should the Court in this case approve the appellants' contentions that the excluded testimony was admissible for altering the written provisions of the contract of hire, a clear conflict between the circuits would be created.

In the *Montoya* decision the Court did suggest that the rule might be otherwise in the case of fraud. However, there is not the slightest indication of fraud in this case, nor do the appellants make such a claim. If anything, a stronger showing of fraud might have been made in the *Montoya* case than in this. There, libelant testified that he did not read English well, and that he was not shown the controlling provision of the shipping articles. In this litigation appellants' witnesses, on cross examination, stated that they knew that union agreements covered the subject of war bonuses (A. 36, 37*); that a union representative was present at the time the articles were signed and union members relied upon him to protect their interests (A. 56, 57*); that the commissioner read to them the governing portion of the articles in their entirety (A. 58*); and that the riders attached to the articles were also attached to the fo'c'sle card up to the time of sinking (A. 80, 81*).

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*Apostles on Appeal in *Hilda Sterling v. Matson Navigation Co.*, No. 12,351.

In summary, appellee submits that the District Court did not err in excluding testimony offered for the purpose of altering the plain terms of a written contract. Appellee further contends that the excluded testimony does not support appellants' argument that the parties by their conduct construed the contract of hire in a manner supporting the interpretation urged by the appellants.

III. The District Court Did Not Err in Excluding Evidence Purporting to Establish a Contemporaneous Oral Contract Governing War Bonuses.

Appellants also contend that the excluded evidence would establish a contemporaneous oral contract specifically providing for the payment of war bonus while crew members were interned on land. This farfetched contention is entirely unsupported by the evidence or law. The libelants did not plead an oral contract; their libels are specifically predicated on a written contract. No motion was made to amend. Appellants cannot now switch their theory of the case from a written to an oral contract. There is ample authority for the proposition that there can be no material variance between allegations of a libel and the evidence offered at the trial to sustain the libel.

The I.S.E. 2 (C.C.A. 9th) 31 F.2d 107; 1929 A.M.C. 707;

The Columbia (N.D. Cal.) 1924 A.M.C. 592; *aff'd* 4 F.2d 673;

The General George W. Goethals (E.D. N.Y.) 1928 A.M.C. 378;

The Mar Mediterraneo (S.D. N.Y.) 1928 A.M.C. 511, 513.

Moreover, if all the stricken testimony were admitted, there is nothing to suggest that a valid oral agreement governing war bonus rights was reached. The written contract, which consists of the articles, the rider attached thereto, and supplementary agreements referred to therein, expressly governed the question of war bonuses. A collateral oral contract conflicting with the terms of a written contract specifically covering the subject matter may not be established.

See,

Sickelco v. Union Pac. R. Co. (C.C.A. 9th) 111 F.2d 746, 750.

IV. The District Court Did Not Err in Excluding Evidence Purporting to Establish a Deviation.

Appellants contend that evidence excluded by the trial court would have established a deviation entitling them to the fullest amount of compensation. The correctness of the trial court's ruling in excluding this evidence is even more clear, if possible, than its other exclusionary rulings. The appellants did not claim a deviation in their libels, so that allowing introduction of this evidence would improperly create a material variance between the proof and the pleadings. Moreover, it is not clear how consequent benefits to appellants are to be derived from establishing a deviation. Ordinarily deviation is urged to abrogate contracts of affreightment or policies of marine insurance. In respect to their attempt to apply this doctrine here we wonder if counsel for appellants are prepared to accept the logical consequence that the shipping articles were abrogated by the deviation. Since any claim for war

bonus which is entirely dependent on this contract would then automatically collapse, appellee will join appellants in a stipulation to this effect, if desired. At most, however, a deviation respecting shipping articles can render a ship operator liable only for wages during the deviation or damages directly caused by the deviation. Neither Matson nor appellee has ever denied that appellants were entitled to basic and emergency wages until repatriated to a United States port, and in fact Matson has paid the same to appellants. Assuming that the destination was changed from the Philippine Islands to New Zealand after December 7, 1941, this would have added security to the voyage rather than expose the crew to greater risks. If this change were a deviation, it is not shown what damage, if any, it caused appellants. The cases cited by appellants are not pertinent to this litigation; nor do they indicate how a deviation can confer a right to a special form of compensation such as war bonus not otherwise granted by contract.

Furthermore, it is patent that there was no deviation. The shipping articles describe the voyage of the *Malama* as follows:

> "From the Port of San Francisco, California, to Ports in the Philippine Islands by a route, including stops, as ordered by an agency or department of the United States Government * * *"

The testimony which appellants sought to introduce does not establish that the destination of the *Malama* had been altered; it merely shows that the *Malama* was heading to New Zealand at the time it was sunk. The articles clearly state that the "route, including stops" may be defined

by the order of an agency of the government. The Court may take judicial notice of the fact that at the time the *Malama* sailed from Honolulu on December 17, 1941, the routes of all merchant vessels flying the American flag were strictly controlled by our military and naval authorities. There is no showing that the sailing of the *Malama* was not in conformance with such an order, which would be necessary to establish a deviation from the terms of the articles. The District Court expressly found that the route had been fixed by governmental order (A. 88). Consequently, we submit that the evidence was not only irrelevant to the pleaded issues involved in this litigation but also that it falls far short of establishing a deviation.

V. The District Court Did Not Err in Denying Libellants Maintenance During Internment by the Enemy.

As stated at the inception of this brief appellee, in answering the impleading petitions of Matson, denied any liability to Matson, even in the event the latter were held liable on the claims by appellants for maintenance during internment and until their return to the United States. Appellee, however, joins with Matson in denying the latter's liability to appellants for such claims for maintenance and adopts and reasserts the discussion contained in the brief filed by Matson covering this subject. Furthermore, since appellants concede that the claims for maintenance are of the same nature as those pressed in *The President Harrison* and since nothing new is presented by them showing why that decision is improper, appellee rests upon the authority of this Court's decisions in that case as full support of the District Court's conclusion that

appellants in the present case have no right to maintenance during internment.

CONCLUSION

In conclusion, appellee submits that the only material issue for this Court is whether the contract of hire provided for war bonus during internment on land. Appellee earnestly contends, for the many reasons stated herein, that the contract of hire, consisting of the shipping articles, the riders attached thereto, and the supplementary agreements expressly referred to therein, clearly did not provide for a war bonus during internment on land. Matson has willingly met its obligations under the contract of hire and has paid appellants wages and emergency wages during the full period of internment and repatriation in amounts that range from $3,665.75 to $14,473.71 (A. 23, 24). Its rights should now be respected, particularly since the relevant portions of the contract of hire are contained in collective bargaining agreements which representatives of appellants participated in negotiating. Appellee reiterates that these are not the circumstances that invoke the traditional solicitude of the Admiralty Courts for seamen. Appellants have already been paid by Matson compensation benefits for internment that are comparable to benefits paid the vast majority of merchant seamen as well as civilian employees of the United States, and of its contractors, interned during the war. To now grant appellants additional benefits contrary to the express provisions of the contract would not only deny Matson its rights under the contract but would also impose upon appellee, the United States of America, an obligation un-

warranted by the evidence and law applicable to this case and by national policy respecting the great number of other persons similarly exposed to the rigors of internment camps. Consequently, appellee urges that the judgment rendered by the District Court in these cases be affirmed by the Court of Appeals, and that its mandate be issued to that effect.

Respectfully submitted,

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(Appendix follows)

APPENDIX

SUPPLEMENTARY BONUS AGREEMENT GOVERNING LICENSED PERSONNEL, INCLUDING THE RADIO OPERATOR

The pertinent portions of the M.M.&P. supplementary bonus agreement are reproduced as an example of a licensed personnel agreement. The agreements of the M.E. B.A. and the A.C.A. are identical.

"(2) War risk areas wherein war risk bonuses shall be paid licensed officers are set forth as follows:

Area I Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland.

Area II Trans-Atlantic voyages to Russia (Archangel, etc.).

Area III Trans-Pacific voyages to Russia (Vladivostok, Petropavlosk).

Area IV Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula.

Area V Trans-Pacific voyages to New Zealand or Australia.

Area VI Canada (Atlantic Coast).

"Subject to terms and conditions following, war bonuses shall be paid in the respective areas as above defined, as follows:

Area I (a) 66⅔% of basic wages for the entire voyage; $100 for Suez or any other port which is subject to regular bombing, plus

\$5 per day for each day beyond five days that the vessel is in that port; and (b) \$45 for each port in the Red Sea and Persian Gulf not covered in Paragraph (a) supra.

Area II 66⅔% of basic wages for the entire voyage, and \$75 for each Russian port.

Area III 66⅔% of basic wages after crossing the 180th meridian, westbound, until recrossing the same meridian eastbound, and \$75 for each Russian port.

Area IV 66⅔% of basic wages from the crossing of the 180th meridian, westbound, until recrossing the same meridian eastbound.

Area V 66⅔% of basic wages from arrival of vessel in Suva or the crossing of the 180th meridian, westbound, until departure from Suva or crossing the 180th meridian eastbound.

Area VI 25% of basic wages while vessel is north of 35 degrees of north latitude.

"On round-the-world voyages, westward, 66⅔% of the basic wages from the crossing of the 180th meridian westbound until arriving in a Continental United States East Coast or Gulf Coast port, or at the Panama Canal. If any vessel referred to in Area I continues eastbound to United States ports via India and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th meridian, eastbound, and thereafter no further bonuses will be payable.

* * * * * * *

"(4) In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be repatriated to a Continental United States port.

"While employees are in the war zones areas described herein war bonuses shall also be paid to them at the rate of 66⅔% of the said basic wages in Areas I to V inclusive, and 25% in Area VI."